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## **Media Release**

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### **Victory Declared in Challenge to Federal Environmental Protection Agency Six states win big in U.S. Second Circuit Court of Appeals Ruling**

A three-judge panel of the U.S. Court of Appeals for the Second Circuit in New York City yesterday handed a major victory to Delaware and the five states involved in challenging the federal Environmental Protection Agency's Phase II Rule, which would have essentially allowed power plants to cause more environmental harm with no regulatory control and encourage existing power plants to pollute more.

On July 26, 2004, the Delaware Department of Justice, along with the States of Connecticut, Massachusetts, New Jersey, New York and Rhode Island, filed a multi-state lawsuit asking the Court of Appeals to remand the EPA's Phase II Rule. The Second Circuit ruled yesterday that the EPA either exceeded its authority or drafted provisions that violated the Clean Water Act.

"This ruling is a major victory for the six states which took up this cause to strike down a set of regulations that are contrary to the intent of Congress in passing the Clean Water Act," Attorney General Joseph R. Biden, III said. "This Department of Justice will remain vigilant in its effort to protect the environment around us. We will continue to pursue multi-state efforts to address regional pollution problems."

The lawsuit specifically challenged the way the EPA regulates water intake systems at power plants. The Attorneys General challenged the EPA's decision not to select closed-cycle cooling systems, which minimize adverse impacts on the surrounding environment, as the best technology available to older power plants. Certain provisions of the Phase II rule would make it virtually impossible to require such cooling systems at any of the nation's older power plants.

The Phase II rule rejected the need for closed-cycle cooling systems, making it easier for existing power plants to avoid installing the best technologies available to reduce the large amounts of water currently being withdrawn from nearby oceans, bays and rivers. In addition, Phase II would allow the power plants to utilize a suite of cheaper technologies, including installing screens that prevent fish from being sucked into the plants' massive intake flows or designing restoration projects to attempt to mitigate damage to the environment after it had already been done. The former technology has been shown to result in the death of many fish too small to be caught on the screens and those that are impaled on the screens because they are not strong enough to escape the intake flow. The latter is simply impermissible. These technologies were allegedly favored by the EPA for cost reasons.

The Second Circuit ruled that the EPA cannot consider costs in relation to benefits when selecting the best technology available, stating the "EPA must require facilities to choose the technology that permits them to achieve as much reduction of adverse environmental impacts as is technologically possible."

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